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## ANSWER TO INQUIRIES AS TO THE NUMBERING OF VOL. XXV OF THE MASSACHUSETTS LAW QUARTERLY.

I regret that the numbering of the recent "Second Supplement for 1940" has caused some misunderstanding. The parts of Vol. XXV thus far issued are as follows:

"Preliminary Supplement Part 1 to No. 1" for Jan.-Mar., 1940 (The last part of this pamphlet was described on the cover as "Preliminary Supplement Part 2," mainly for the purpose of attracting attention to its contents as convenient for reference.)

No. 1, the first regular number, of Vol. XXV.

"No. 3," which is also described in large type as

"Second Supplement for 1940".

The purpose of this irregular numbering, which should have begun in January, is to indicate, by number, the order in which these things called "Supplements" belong. For twenty years or more, special numbers were issued in addition to the regular QUARTERLY numbers and sent out as second-class mail with the knowledge and approval of the Boston Post-office. A few years ago the Post-office department changed its ruling and decided that special numbers could not be issued as second-class mail, which only covered four regular numbers of a QUARTERLY. Accordingly, the somewhat absurd description "Preliminary Supplement" to a regular number was adopted and these supplements were sent out under a different postage classification. This practice gave no indication to those checking up a volume as to the number of pamphlets composing the volume. It was for this reason that the last pamphlet was marked "Number 3" with the added explanation that it was the "second supplement for 1940".

This present regular April-June number is called "Number 4" for the same reason.

F. W. GRINNELL, *Editor.*

June, 1940.

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*Entered as Second-Class Matter at the Post Office at Boston.*

## LESS EXPENSIVE RECORDS ON APPEAL — THE RULE IN THE FOURTH FEDERAL CIRCUIT TO BE CONSIDERED IN THE FIRST CIRCUIT.

The expense of printing the record on appeal has been commented on for years, but, as Mark Twain said about the weather, "nobody seems to do anything about it". The last reference to the subject by the Judicial Council appeared in the 13th Report (on page 41), where, among the things which might, perhaps, be done by the court under its existing authority, the council suggested:

> "The records on appeal should be less expensive and shorter. We do not believe in the narrative record but in many jurisdictions a single typewritten copy of the entire record below is adequate for the appellate court. It is the usual record upon which parties prepare briefs and the briefs can quote the pertinent parts of the record.
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> "The encouragement of shorter briefs, save where the brief embodies for reference relevant parts of the record."

Since the adoption of the new Federal rules, the Circuit Court of Appeals for the Fourth Federal Circuit has adopted a rule, numbered "ten" in its revised rules, which is printed below for the information of the bar.

This rule deserves study, as we understand that it is under consideration by the Circuit Court of Appeals for the First Circuit, and that it may be brought up for discussion in the fall at the annual circuit conference of judges and representatives of the bar called for by the recent act of congress, and referred to by Judge Magruder at the recent "Bench and Bar" dinner, and also by Chief Justice Hughes in his remarks at the opening of the American Law Institute in May (see *American Bar Association Journal* for June, 1940, p. 473). F. W. G.

### RULE 10 OF THE FOURTH FEDERAL CIRCUIT.

PRINTING OF RECORDS AND BRIEFS — CONTENTS OF BRIEFS.

**1. Unless ordered by the court, it shall not be necessary to print the record on appeal or on a petition for review of or enforcement of an order, except that the appellant or petitioner shall print as a part of the supplement or appendix to his brief the judgment, decree or order appealed from or sought to be reviewed or enforced, together with any opinion or charge of the court, board or commission. If the record is printed, without order of court, the cost of printing shall not be taxed as costs in the case except in cases where for special cause shown the court shall otherwise order.**

2. The brief of the appellant or petitioner shall contain:

(a) An index and table of citations with cases alphabetically arranged. Where state statutes are relied on they shall be copied in the brief.

(b) A brief statement of the case together with a succinct statement of the questions involved, separately numbered, and the manner in which they are raised in the record.

(c) A clear and concise statement of the facts, with reference to the pages of the typewritten or printed transcript where there is any possibility that the other side may question the statement. Where portions of the testimony are printed in an appendix to the brief or supplement to the brief as permitted by section (e) hereof, the reference may be to such printed testimony.

(d) Argument in support of the position of appellant or petitioner.

(e) An appendix (or supplement to the brief) which, in addition to what is set out in section 1 above, shall contain such parts of the record material to the questions presented as the appellant or petitioner desires the court to read. Stars or other appropriate means should be used to indicate omissions in the testimony of witnesses, reference to the pages of the transcript should be made and the names of the witnesses should be indexed.

3. The appellant or petitioner, within ten days after the filing of the transcript of the record in the clerk's office of the court, shall furnish appellee or respondent, or his counsel, with a statement of the parts of the record he proposes to print with his brief pursuant to this rule.

4. The brief of appellee or respondent shall contain:

(a) An index and table of citations with cases alphabetically arranged. Where state statutes are relied on they shall be copied in the brief.

(b) A statement of the case and of the points involved, if the appellee or respondent disagrees with the statement of appellant or petitioner.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's or petitioner's brief in so far as it is deemed erroneous or inadequate, with reference to pages of the typewritten or printed testimony.

(d) Argument in support of the position of appellee or respondent.

(e) An appendix (or supplement to the brief) containing such parts of the record as he desires the court to read, and as have not been printed in the brief of appellant or petitioner. Stars or other appropriate means should be used to indicate omissions in the testimony of witnesses, reference to the pages of the transcript should be made and the names of the witnesses should be indexed.

5. The appellant or petitioner may file a reply brief and may set forth in an appendix thereto such parts of the record as he may wish the court to read in view of the parts printed by the appellee or respondent.

6. Briefs shall not exceed fifty printed pages in length except by special permission of the court; but this limitation shall not apply to the appendices or supplements to the briefs hereinbefore provided for.

7. Briefs, other than in appeals *in forma pauperis*, shall be printed and the cost of printing same, with the appendices or supplements to the briefs hereinbefore provided for, in an amount not exceeding $1.50 per printed page, shall be taxed as costs in the case; provided that, when in the opinion of the court unnecessary matter has been printed, it may withhold or divide costs as justice may require.

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## *DIRECTIONS FOR TAKING AND PROSECUTING APPEALS IN THE FOURTH CIRCUIT.*

### DIRECTIONS TO APPELLANT.

3. If possible, enter into stipulation with counsel for appellee designating the part of record to be included in the record on appeal, and file the stipulation with the District Court Clerk. 75(f). If no stipulation can be agreed on, serve on appellee a designation of parts of record to be contained in record on appeal and file same with the District Court Clerk. 75(a). If the complete record is not designated, serve and file with designation a concise statement of points relied on. 75(d). If evidence is to be included, file with designation two copies of reporter's transcript. 75(b). A condensed narrative statement of the evidence may be filed in lieu of reporter's transcript; but any other party to the appeal may require the testimony to be in question and answer form. 75(c). (As evidence brought up on appeal will generally be in the form of the reporter's transcript, it is suggested that the parties have the reporter make an original and four copies, one each for appellant and appellee, one to remain in Clerk's office, one to be incorporated by the Clerk in the transcript on appeal, and one to be used in case application is made to Supreme Court for *certiorari*. The original should be the one incorporated in the transcript. Let the pages of the evidence be numbered by the reporter at the bottom; and in referring to same in briefs, reference can be made to pages of the evidence as thus numbered, instead of to pages of the transcript; and, as counsel will have copy of the evidence and the paging will necessarily be uniform, there will be no difficulty in making citations to the evidence in preparing briefs whether counsel have copy of the entire transcript or not.)

4. Within 40 days from the date of the notice of appeal, have the District Court Clerk file a certified transcript of the record on appeal with the Clerk of the Circuit Court of Appeals. 75(g). Write the Clerk of the Circuit Court of Appeals to docket the appeal, and send him docketing fee of $35, except in pauper cases.

5. Within ten days after filing the transcript for docketing, notify appellee or respondent, or his counsel, as to what parts of the record you propose to print as an appendix or supplement to your brief. (See 6(e) below.)

6. Twenty days before the term at which the case is docketed for hearing, file a printed brief in accordance with the rule of this Court. The brief is required to contain:

(a) An index and table of citations with cases alphabetically arranged. Where state statutes are relied on they must be copied in the brief.

(b) A brief statement of the case together with a succinct statement of the questions involved, separately numbered, and the manner in which they are raised in the record.

(c) A clear and concise statement of the facts with reference to the pages of the typewritten or printed transcript where there is any possibility that the other side may question the statement. Where portions of the testimony are printed in an appendix to the brief or supplement to the brief as permitted by section (e) hereof, the reference may be to such printed testimony. *Where the reporter's transcript of the evidence is sent up as a part of the transcript as indicated under 3, it will be sufficient to refer to the pages of the evidence as numbered by the reporter.*

(d) Argument in support of the position of appellant or petitioner.

(e) An appendix (or supplement to the brief) which shall contain the judgment of the court below together with any charge, findings or opinion of the trial Judge and such other parts of the record material to the questions presented as the appellant or petitioner desires the Court to read, with stars or other appropriate means used to indicate omissions in the testimony of witnesses. Reference to the pages of the transcript should be made (reference may be made to reporter's transcript of evidence if same is sent up as indicated under 3 above) and the names of the witnesses should be indexed.

7. If it is desired to file a reply brief, file same three days before the day set for argument.

DIRECTIONS TO APPELLEE.

1. If you have not entered into a stipulation with appellant designating the parts of the record to be included in the record on appeal, you should, within ten days after designation of record is served on you by appellant, serve designation on him of any additional parts of record that you desire included in transcript, and file your designation with the District Court Clerk. 75(a). If appellant has filed a condensed narrative statement of the evidence and you desire it sent up in question and answer form, serve notice demanding that this be done and file it with the Clerk. 75(c).

2. Five days before the term at which the case is docketed for hearing, file a printed brief in accordance with the rule of this Court. Note that you may include in an appendix or supplement to the brief such parts of the record as you desire the Court to read and as have not been printed by the other side in its brief. . . .

NOTE: Briefs should not exceed fifty pages in length except with permission of the Court; but this limitation does not apply to the "appendix or supplement to the brief" in which parts of the record are printed.

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See Rules 73 and 75 of the Federal Rules of Civil Procedure and Rules 10, 11 and 12 of the Revised Rules of Practice of the Circuit Court of Appeals of the Fourth Circuit for the rules under which the foregoing instructions are formulated.

## IS THE WORD "ETHICS" BEING OVERWORKED?— THE "LAW LIST" CONTROVERSY.

*(From "American Law and Lawyers," April 27, 1940.)*

Repeal of canon 43 of the American Bar Association's canons of professional ethics, in order to correct an anomalous situation with regard to commercial and non-commercial law lists, legal ethics and the work of two of the Association's committees, is recommended by Charles B. Stephens, editor of the *Illinois Bar Journal,* in a discussion of the problem in the *Chicago Daily Law Bulletin.*

It is Mr. Stephens' view that canon 43, which makes it unethical for a lawyer to allow his name to be published in a law list not approved by the Association's committee on law lists, is illogical, in that it makes an offense against ethics of an act which under other circumstances would be perfectly proper, the circumstances having nothing to do with the matter of professional conduct.

The writer also maintains that the canon in question should be repealed because it is causing jurisdictional confusion between the professional ethics committee and the law list committee, and because it is unnecessary, in order to give force and effect to the law list committee's disapproval of a list, that any sanction be imposed by way of an unrealistic canon of ethics.

Foreseeing a threshing out of the whole matter at the Philadelphia convention of the Association in September and the possibility that both committees may emerge with their wings clipped, Mr. Stephens declares the situation calls for a definite statement of policy by the committees that will serve to clear up the confusion, particularly with reference to such non-commercial lists as the registers published by the New York and Illinois State Bar Associations.

Mr. Stephens recounts how the Illinois association found itself in a dilemma with reference to its register when it applied to the law list committee for approval and the committee ruled that the publication did not require approval. Then came the professional ethics committee with a ruling that the insertion of biographical material in the Illinois register was improper because the register was not approved by the law list committee.

Technically the ethics committee could not hold otherwise, because canon 27, stating what biographical information about a lawyer may properly be published in a directory, uses the term "approved law lists and legal directories," and the word "approved" was given definite meaning by canon 43.

By repealing canon 43 and amending canon 27 to omit the word "approved" the whole matter can be cleared up, Mr. Stephens believes.

Referring to the American Bar Association's practice of approving law schools that measure up to its standards, the writer points out it was never thought necessary to make it unethical to graduate from an unapproved school, yet the prestige that comes from being approved gives a school a decided advantage over others.

Likewise among law lists, the prestige of having the law list committee's approval would be of great advantage and financially well worth the expense of undergoing investigation by the committee, Mr. Stephens remarks.

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## "APPRAISAL OF JUVENILE COURT NEEDS."

*(By the Committee of the Massachusetts Civic League on the Cause and Cure of Crime.)*

In the QUARTERLY for October-December, 1939, attention was called to the "Report of the Massachusetts Child Council" submitted to the Special Commission to Investigate the Juvenile Court System of which Senator John D. Mackay is chairman. Some comments were added in regard to the suggested jurisdiction of "predelinquency" contained in that report. The report of the Committee of the Massachusetts Civic League has also been submitted to the Special Commission and the following summary of it appeared in *The Lens* of May 24, 1940 (Vol. xviii, No. 5). ED.

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This report was prepared and presented to the Commission by a sub-committee consisting of: Eliot Sands, Probation Officer of Boston Juvenile Court; Robert True, Boston District Agent of Massachusetts Society for the Prevention of Cruelty to Children; Orazio E. Vaccaro, Visitor for State Division of Child Guardianship; Kenneth I. Wollan, Director of Citizenship Training Department of Boston Juvenile Court. The full recommendation of the Committee may be seen in the League office, 3 Joy Street, Boston.

### *SUMMARY OF THE REPORT.*

**There is no accepted order of procedure today which gives promise of providing the answer to the problem of delinquent care. A member of our committee who visited eleven of the largest juvenile courts in the country reports that all of these had marked shortcomings and difficulties. The creation of special juvenile court machinery has neither terminated the appointment of unqualified personnel nor removed the political aspect of appointment.**

The establishment of an entirely new court system for the handling of juvenile delinquents does not seem to be the major need of the moment. The alleged incompetence of certain district courts would not necessarily be remedied temporarily or permanently by changing the system.

The district courts with few exceptions seems to be giving juvenile offenders reasonable quick and careful disposition. In effect these courts act as a family court. The local justice learns to know the home community and its individual problems. He is frequently more capable of understanding the individual cases and rendering helpful disposition than a justice who, though he may specialize in juvenile offenders, comes into the community only infrequently.

As much of the Commonwealth is rural, and consequently some district courts hear few juvenile complaints (21 of the 73 courts with juvenile sessions heard 25 or less juvenile complaints, 9 courts heard 10 or less), it appears self-evident that the district court justice who is already established should hear the juvenile complaints.

We therefore, see no reason for establishing a statewide juvenile court system and recommend that the district courts be maintained as the working basis for juvenile justice in the Commonwealth.

As the specialization which is possible in a juvenile court setup has many values, particularly in congested areas where the skillful use of existing rehabilitation resources demands the full time service not only of probation officers but of judges as well, any congested community should have the right to this specialized juvenile service. Statutory provision should be made so that a juvenile court may be established without delay or red tape if a community specifically indicates this desire.

We believe that the standing justice should hear all juvenile cases. If for some reason this is not possible, one special justice should be assigned by the presiding justice to take over these duties so that he may become well acquainted with juvenile law and juvenile problems.

The major weaknesses of the district courts center around inadequate probation service. We believe that any money available for juvenile work may be better allocated for more specially trained probation officers than for new justices. There is a definite need for the appointment of qualified probation officers who shall handle only juveniles and who shall give all courts equally specialized service. For those courts hearing large numbers of cases we recommend the appointment of one carefully selected juvenile probation officer for every 150 annual juvenile complaints. Appointment may remain in the hands of the local justice.

For those courts which serve rural areas we recommend a circuit probation service. The local justice may hear the case in special juvenile session but he shall use the circuit juvenile probation officer for both investigation and probation supervision. In this way, the actual handling of the boy would rest mainly on one who specializes in understanding youth and its needs.

As a result of the small court districts in Massachusetts it frequently happens that a juvenile living in one district is on probation to a court in another jurisdiction. In general it is safe to say that any probation officer works less efficiently outside the jurisdiction of his own court.

We recommend that in such cases the court hearing the complaint transfer supervision to the court where the probationer resides, this transfer to be discretionary.

The right of appeal for juveniles is a matter which has been widely discussed. In Massachusetts the child has the right of appeal from both finding and disposition and to have an entirely new trial in the superior court. This right of appeal should be maintained both as a protection for the judge and the juvenile. However, we suggest this change which will eliminate the possibility of placing juveniles on probation to the superior court. If on appeal the disposition is probation, the individual should be referred back to the original court for this supervision, however, the superior court to maintain control for final disposition.

Suggestion has been made that part of the work of the juvenile court should be the exercise of supervision over "pre-delinquents." We do not see how "pre-delinquency" could be defined to make the use of the courts possible. To instruct the court or its probation officers to step in and exercise supervision without tangible evidence of violation of law would be to authorize unwarranted interference with the liberty of those concerned. Preventive work is one of the central problems confronting us today, but we believe that this burden should not be placed on the courts.

The present Massachusetts law establishes jurisdiction for delinquents between the ages of 7 and 17. This committee believes that the Massachusetts age limits should stand. The sixteenth year seems to be a reasonable point for the separation of the younger and older offenders.

A mental and physical examination under rules prescribed by the Commissioner of Mental Health is required by law for all delinquents before commitment. That these examinations are perfunctory and are given little attention in most of our courts today is common knowledge. Three things need to be done before we can have effective administration of this law: 1. Realignment of our institutional facilities, a task which may be considered by the Trustees of the Massachusetts State Training Schools. 2. The Department of Mental Health must provide the court with expert service for the juvenile offender. 3. The judges must stand ready to use this service early enough in the proceedings to make the results available for the court's guidance.

Our Committee recommends that this Recess Commission call into conference representatives of the Trustees of the Massachusetts State Training Schools, the Department of Mental Health, and the Administrative Committee of the District Judges to jointly work out the problems relative to a careful, effective administration of this law.

## "THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS."

*(A Statement by Chief Justice Hughes at the Meeting of the American Law Institute in May, 1940.)*

Let me say a word as to the new development in the establishment of the Administrative Office of the United States Courts. This office was created, as you know, by an Act which took effect on November 6, 1939. It is not an executive establishment. It does not place judicial administration under executive control. The office is under the direct supervision of the federal courts. It is immediately responsible to the Judicial Conference of Senior Circuit Judges. The Supreme Court appoints its Director and Assistant Director. We were especially fortunate in obtaining the service, as Director, of Henry P. Chandler of Chicago, an able and experienced lawyer, long identified with efforts of the Bar to improve the administration of justice and a leader in progressive civic movements. We also had the good fortune to bring to the work of the office, as Assistant Director, Elmore Whitehurst, who as secretary for many years of the Judiciary Committee of the House of Representatives, had exceptional experience in dealing with the legislative aspect of many judicial problems.

The Administrative Office has two distinct functions. One is to deal with the business affairs of the federal courts, previously handled by the Department of Justice. These embrace budgets, audits of accounts, personnel, and the procurement of facilities and supplies. The other function deals with the appropriate supervision of the work of the courts. Thus we have the two main divisions of the office, (1) the Division of Business Administration, and (2) the Division of Procedural Studies and Statistics. The chief of this second division is Will Shafroth, who has long enjoyed a high reputation by reason of his careful studies of judicial administration. Through the work of this division we expect real progress in the development of a reasonably adequate system of judicial statistics. The Administrative Office is gradually, with proper care and deliberation, building up its staff which will soon be complete, and, pending its completion, the office has had the benefit of the continued service and wholehearted cooperation of the Department of Justice.

One of the best features of this plan is that it provides for a natural and helpful evolution of the Judicial Conference of Senior Circuit Judges, the responsibility of which is greatly enlarged. Through its power and duty to supervise and direct the Director of the Administrative Office, the Judicial Conference now has the immediate responsibility of looking after the work of the federal courts, other than the Supreme Court,—their needs and their performance of duty. The Senior Circuit Judges know the general conditions in each circuit, and they are now in a position to be

informed on all points by the information obtained by the Director of the Administrative Office who thus provides the centralized and executive administration necessary to give coherence and efficiency to the entire scheme.

Another provision of the Administrative Office Act gives the decentralization which is necessary to buttress the sense of local responsibility and to give opportunity for speedy correction of local defects in administration and for consultation as to local problems. This aim is achieved in two ways. First, the statistical data and reports of the business transacted in the courts is transmitted quarterly by the Director to the Senior Circuit Judge of each circuit. All the Circuit Judges in a circuit are constituted a Judicial Council for that circuit, and to that Council the Senior Circuit Judge submits the reports he has received and the recommendations he may wish to make. It is made the duty of the District Judges promptly to carry out the directions of the Council as to the administration of business in their respective courts. Thus, without interfering with judicial prerogatives and proper judicial independence, the Circuit Judges of a circuit are empowered to maintain, and should maintain, a constant supervision of the administration of justice in that circuit and may, and should, see that any necessary steps are taken to correct procedural defects and to expedite the work of the courts.

The second method set up by the Act is found in the provision that there shall be held annually in each circuit a Conference of all the Judges of the circuit, both District Judges and Circuit Judges, with participation by representatives of the Bar if that is desired, for the purpose of considering the state of the business of the courts and devising ways and means of improvement.* There is thus to be provided a forum for those best informed as to local difficulties in administration and best qualified by experience to deal with them. Through these judicial conferences in the circuits, undoubtedly matters will be developed for the consideration of the Judicial Conference of Senior Circuit Judges and thus their work of supervising and directing the Administrative Office will be aided by the information and suggestions that will come from the respective local conferences. This plan has rich promise. The courts are now equipped to manage their own affairs and will have the correlative responsibility.

With all these plans, it still remains for the Judge to do his work. The able, experienced and conscientious Judge does not need their spur but will be helped by the facilities they may afford for better procedure. In connection with the constant and appropriate demand for promptness in the disposition of controversies, it must be remembered that judicial work demands deliberation. It is not aided by impatience or by unduly hurried and ill-considered

* For the story of the development of the system of federal bar conferences see Reports of Committee on Rule-Making, etc., of the Conference of Bar Association Delegates for 1931, 1932, 1933 and 1936 MASSACHUSETTS LAW QUARTERLY for August, 1931, 7; February, 1933, 54; August, 1933, 69 and July, 1936, 66–67.

action. Thorough consideration and careful decision minimize the chances for delays through appeals and reviews. We cannot afford to lose the ideal of a fair and adequate hearing in a passion for expedition, or to make the processes of the law a mere vehicle for prejudgments or for a mere sorting of facts to suit a preconception of policy.

If democratic institutions are to survive, it will not be simply by maintaining majority rule and by swift adaptations to the demands of the moment, but by the dominance of a sense of justice which will not long survive if judicial processes do not conserve it. The Judge must in truth represent authority, but he is the symbol not so much of power as of justice,—of patience and fairness, of a weighing of evidence in scales with which prejudice has not tampered, of reasoned conclusions satisfying a sensitive conscience, of firmness in resisting both solicitation and clamor. It is in the quality of judicial work—whether performed by courts or by agencies invested with judicial functions—in its expertness, thoroughness, independence and impartiality, that the whole scheme of the law, of government by law, comes to the decisive test. And only as that test is successfully met will the foundations of a sound democracy be made secure.

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## THE JUDICIAL COUNCIL MOVEMENT.*

By

HON. JAMES W. MCCLENDON.

*Chief Justice of the Court of Civil Appeals of Texas, Chairman of the National Conference of Judicial Councils.*

The judicial council movement has been aptly described as "probably the most significant, if not the most important, development which has taken place in the judicial history of the United States during the last half century."† The same authority adds: "Indeed, we doubt whether any more enlightened movement to improve the administration of justice has been undertaken in this country since the formation of the Union."

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* From the Handbook of the National Conference of Judicial Councils.

In the fall of 1939 the officers of the National Conference of Judicial Councils met with the officers of the Section of Judicial Administration of the American Bar Association, the American Judicature Society, the Junior Bar Conference, and the Association of American Law Schools to coordinate the programs of these groups in so far as they were directed toward an improved administration of justice. At that meeting it was decided, among other things, that the National Conference should publish a Handbook which would not only contain all pertinent factual information about the judicial councils of the country, but would also contain a complete index to the judicial council reports, a complete bibliography of the published literature dealing with the judicial council movement, and a revised check-list of judicial council reports. Thus, this Handbook has been organized as a tool for the use of those interested in all matters connected with judicial councils. . . .

† Judge Harry A. Hollzer's annual address as Chairman of the National Conference of Judicial Councils at Atlantic City in 1931.

In the background of the movement, extending back well into the nineteenth century, was an ever-widening discontent at the palpable failure of the judicial branch of government to meet the needs of our rapidly changing social, economic and industrial conditions. Characterized by Dean Wigmore, at the time of its republication (February, 1937) in the American Judicature Society Journal, as the spark that kindled the white flame of high endeavor now spreading throughout the entire legal profession and radiating the spirit of resolute progress in the administration of justice, was the celebrated address of Roscoe Pound, dealing with "The Causes of Popular Dissatisfaction with the Administration of Justice," delivered before the Minneapolis Convention of the American Bar Association in 1906. Some seven years later the American Judicature Society was born, having for its general objective improvement of judicial administration. That organization has from time to time sponsored important expedients and methods designed to effectuate this objective. Among these was the judicial council—an official body charged with the duty of continuous study of the judicial system and its functioning, and the devising of methods for the improvement of the system and its adaptation to present day needs.

Probably the first organization of this character was the Board of Circuit Justices set up in Wisconsin in 1913, which has functioned splendidly in its limited field of court procedure. A similar body was authorized in New Jersey in 1915. It was not, however, until the comprehensive final report of the Massachusetts Judicature Commission in 1921, recommending creation of a judicial council in that state, that the movement attained concerted semblance. The following year, upon recommendation of Mr. Chief Justice Taft, the Federal Conference of Senior Circuit Justices was created; and in the next seven years state judicial councils were created: In Oregon and Ohio in 1923; in Massachusetts and Maryland in 1924; in Washington and North Carolina in 1925; in California and North Dakota in 1926; in Kansas, Rhode Island and Connecticut in 1927; in Virginia and Kentucky in 1928; and in Texas, Michigan, Illinois, Pennsylvania and Idaho in 1929.

At the present time more than half the states have judicial councils; all of which, though varying widely in their component personnel, have the above common objective.

As early as 1928 a need began to be felt for a national organization, as a means of bringing together representatives of the several councils, to serve as a forum for the exchange of experiences, and to act as a clearing house of information. To quote further from Judge Hollzer:

> "The evaluation of the general problems common to judicial councils and the analysis of the same by leaders of thought in the field of judicial administration, can be presented best under auspices which will permit all councils to be represented and heard."

By 1929 the importance of the judicial council movement had brought it prominently to the attention of the officials of the American Bar Association; and the president, in conjunction with the Chairman of the Conference of Bar Delegates, invited the several councils to send representatives to the Association's annual convention at Memphis in October, 1929, a large portion of the program of the Bar Delegates' Conference being set aside for reports from the several councils. At the same time Judge Hollzer of the California Council wrote each council suggesting the formation of a national organization. In response to these communications, representatives from the councils of California, Connecticut, Illinois, Massachusetts, Michigan, Ohio, Oregon, Pennsylvania, and Texas met at Memphis and a committee on organization was set up. This committee drafted a plan of organization which was submitted to and adopted by several councils; and the National Conference was formally launched at the Chicago 1930 convention of the American Bar Association. Meantime, upon invitation of the Chairman of the Judicial Section of the Association, the National Conference provided the program for the Section's Annual meeting, consisting of papers upon the history, functions, and actual workings of judicial councils.

From the outset the difficulty of financing an organization of this character, national in scope, was realized and various plans for continuing the National Conference were considered, including principally: (1) Merging with the Judicial Section of the American Bar Association and broadening the scope of the Section; (2) applying to the Association to be created as a separate section; and (3) continuing as an independent organization. These alternatives were carefully considered by the officials of the Association and National Conference for the next three years with the final result of dropping the first two and adopting the third. Meantime close cooperation between the two organizations was maintained and joint annual programs were given. This relation has happily continued to the present. It should be noted that the Bar Association has from the beginning provided the facilities for the annual meetings of the National Conference held at the time and place of the Association's annual convention.

By 1935 the importance was realized of coordinating the activities of the three national organizations having the general common objective of judicial administrative improvement—the Judicial Section of the American Bar Association, the American Judicature Society, and the National Conference of Judicial Councils. A number of meetings of the leaders of these organizations have been held and much progress has been made toward such coordination.

For a number of years the National Conference recognized the existence of a long-felt need for a series of books dealing with the various phases of judicial administration in an accurate, scholarly and comprehensive way—each making definite, concrete recommen-

dations, capable of adaptation to the use of judicial councils in the several states. The one obstacle to supplying this need—that of finances—has been overcome through a generous grant of the Carnegie Corporation of New York; and the publication of these books is now well under way. This subject is treated in the following pages* by Dean Pound, whose valuable services as Director the National Conference has had the good fortune to engage.

Three other important developments in the program of the National Conference deserve comment. The first is the publication of an annual Handbook, the first edition of which appeared last year. The second development, likewise started last year, is the holding of a meeting in Washington in May, just preceding that of the American Law Institute. Representatives from all state judicial councils are invited, and the discussion centers on problems common to the judicial council movement. The third development, which is new this year, is the luncheon to be tendered to the representatives of the judicial councils by the Honorable Henry P. Chandler, Director of the Administrative Office of the United States Courts. The luncheon is an important first step toward a possible cooperation between the judicial councils and the office of the Director.

Essentially appropriate limitations have made it necessary to present this account of the organization and development of the National Conference only in broad, general outline, precluding personal mention of the many able members of the bench and bar throughout the Nation who have played important roles in that organization and development. It is to their unselfish efforts, devotion and zeal, that the National Conference is indebted for its existence and whatever of value it has achieved. It is the hope of the writer that he may at some other time be able to tell the story, interesting and instructive as he believes it to be, in more amplified form.

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* Dean Pound called attention to Orfield on "Criminal Appeals in America", Pound on "The Organization of Courts" both published by the Conference and also announced Pound on "Appellate Procedure in Civil Cases", Robinson "From Arrest to Appeal", Millar on "Civil Trial Procedure" as in preparation.

"If funds are available, it is planned to add a number of other books on subjects of the first importance for improvement of the administration of justice. Those immediately in contemplation are Selection and Tenure of Judges, Judicial Review of Administrative Determinations, A Study of the Jury and Other Fact Finding Processes, and a Survey of Judicial Administration in the United States. As to the first of these, arrangements are already being made."

## LAW REPORTS.

*(Extract from Report of the Board of Governors of the State Bar of California.)*

"After considering a resolution proposed by the Committee on Duplication of Legal Publications, the Board approved a proposal to the State Supreme Court to order the elimination of the table of cases cited from the California Reports and those of the District Courts of Appeal. The Board also recommended to the court that the index in the official reports be reduced in size by eliminating the body of the head notes and presenting only the "catch line" which appears in the head notes. It was pointed out by the committee that the table of cases was infrequently used and that by eliminating this and the body of the index material it would be possible to reduce the number of volumes of reports published, thereby decreasing the annual cost per volume, as well as saving shelf space." (*California State Bar Journal* for April, 1940, p. 126.)

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*For the Consideration of Members of the American Law Institute and Others Interested.*

MEMORANDUM OF SUGGESTIONS AS TO TENTATIVE DRAFT NO. 1 OF THE CODE OF EVIDENCE AND THE DISCUSSION AT THE MEETING OF THE AMERICAN LAW INSTITUTE IN WASHINGTON ON MAY 16TH., 1940.

1. Obviously a number of men were afraid of committing themselves by such general statements as Rule 4, and did not grasp the fact that Morgan had put in these general statements tentatively, only as a foundation for future building. In substance, they were simply the approach of James B. Thayer to the whole subject, which, as I remember it, was that all witnesses were qualified and all probative evidence, if relevant, was admissible unless there were sound definite reasons for exclusion. That is a sound approach for a revision, as distinguished from a restatement.

2. The draft is called a "Code of Evidence," and, beginning with Rule 1, is stated and was discussed as a model statute. It seems to me a mistake to emphasize this statutory aspect. If any state needs, or wants, a statute, it can adopt statutory rules, but my guess is that evidence will be developed, piece-meal, by *rule* of court, as it has been developed, piece-meal, by *decisions* of courts in the past,—the difference in method being the substitution of rules, as needed, when the need is realized in a rule-making era, instead of the long dilatory practice of development by decision, to which Morgan referred when he said that it took the Supreme Court of the United States one hundred and fifty years to reach the opinion in the Funk case.*

* 290 U. S. 371.

3. The Advisory Committee, on the Federal Rules, were, at first, uncertain whether evidence was within the rule-making statute but changed their minds later.**

If there is any part of the adjective law which comes within the rule-making power under general statutory language, or as part of the "inherent" power, it seems to be what James B. Thayer referred to as "the rules of evidence properly so-called". These rules are almost entirely the result of judicial action in the past. The probability that the model code, or those parts of it which are considered desirable in any jurisdiction where they are not already in force, may be adopted by rule of court, or even by decision, as in the Funk case, should be emphasized in the next draft. I suggest that the word "code" should be omitted from the title and the draft submitted as a tentative draft of "Rules of Evidence". The codifying fever, which started in Massachusetts about 1820 and was cured there by Dane, Story, Jackson and Shaw,† and then passed to David Dudley Field in New York, where it was not cured, is still strong and should be checked so far as practicable in the procedural and adjective field, of which evidence is a part. The whole rule-making movement is opposed to legislative development in this field.

4. Rule 2, clause (7) defines "jury" as including a judge. I am uncertain about this clause. If it means in the later provisions, or those which are to come in the next draft, that rules are necessarily the same for a judge and jury, I doubt its advisability—unless the Institute finally discriminates carefully between rules peculiarly adapted for one form or the other of trial. The fact that, for insufficient reasons, jury trial rules have been applied to jury-waived cases raises the question as to how far the two methods of trial should continue to be governed by the same rule. Probably this is, or will be, dealt with later.

Respectfully submitted for what it is worth.

FRANK W. GRINNELL.

May 23, 1940.

** See Preliminary Draft of Rules, May, 1936, "Foreword", p. XVII, and note to proposed rule 50 and later report of April, 1937, p. 108, note to proposed rules 44–45 and see Chairman Mitchell's statement Report of Cleveland Institute in 1938, p. 186.

† See "Some Forgotten History About Codification" I MASS. LAW QUARTERLY for August, 1916, 319.

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NOTE.

I believe in the formulation of model rules as a helpful professional contribution. I am a heretic about uniformity (urged for the sake of uniformity) in practice and procedure, etc., which I believe should remain a matter of local experiment "in convenience and effectiveness", in order to avoid the stagnation likely to result from the compromises involved in the preparation of "uniform" laws.‡ For this reason, I believe that both the National Conference of Commissioners on Uniform State Laws and the American Law Institute, when dealing with procedure or adjective law, should confine their work to the preparation of model revisions for study in the states which need them or parts of them, rather than uniform acts to be urged on the states merely for uniformity.

F. W. G.

‡ See Prof. Sunderland's comments in *Harvard Law Rev.* for April, 1926, pp. 744–5.

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